



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 14 2008

Laurence Levy, Esq.

New York, NY 10007

RE: MUR 5943
Rudolph W. Giuliani
Rudy Giuliani Presidential Committee, Inc.
and John H. Gross, in his official capacity as
treasurer

Dear Mr. Levy:

On October 9, 2007, the Federal Election Commission notified your clients, Rudolph W. Giuliani, Rudy Giuliani Presidential Committee, Inc. and John H. Gross, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act").

On October 22, 2008, the Commission found, on the basis of the information in the complaint and information provided in response to the complaint, that there is no reason to believe your clients violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Shana Broussard, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Allen", is written over a horizontal line.

Mark Allen
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENTS:** Rudolph W. Giuliani MUR: 5943
5 Rudy Giuliani Presidential Committee, Inc.
6 and John H. Gross, in his official capacity
7 as treasurer
8

9 **I. INTRODUCTION**

10 This matter is based upon a complaint alleging that Presidential candidate Rudolph W.
11 "Rudy" Giuliani and the Rudy Giuliani Presidential Committee, Inc. and John H. Gross, in his
12 official capacity as treasurer ("Giuliani Committee"), violated the Federal Election Campaign
13 Act of 1971, as amended ("the Act") by establishing, financing, maintaining and controlling a
14 newly-created Missouri limited liability corporation, Take Initiative America, LLC ("TIA"), for
15 the purpose of soliciting and receiving contributions in excess of federal limits to support a ballot
16 initiative measure in California. Specifically, the complaint alleges that the Giuliani Committee,
17 through its alleged agent, Paul Singer, solicited or directed contributions to TIA in excess of the
18 federal limits in violation of 2 U.S.C. § 441a; solicited or directed contributions to TIA from
19 impermissible sources such as corporations or foreign entities in violation of 2 U.S.C. §§ 441b
20 and 441e; and coordinated with a California state political committee, Californians for Equal
21 Representation, resulting in an excessive in-kind contribution to the Giuliani campaign in
22 violation of 2 U.S.C. § 441a.

23 **II. FACTUAL BACKGROUND**

24 On July 17, 2007, California resident Thomas Hiltachk submitted a ballot measure
25 entitled the "Presidential Election Reform Act" to the Attorney General of California to begin the

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process of qualifying the measure for the June 2008 Primary ballot.¹ The ballot measure sought to change the way the State of California allocates its presidential electors by apportioning electors according to the popular vote winner in each congressional district rather than the current statewide winner-take-all system. According to media reports, if the measure qualified for the June 2008 ballot and was approved by a majority of voters in the state, it would have gone into effect for the November 2008 general election, where it was expected to allocate a portion of California's fifty-five electoral votes. See Bill Schneider, *Republicans Want a Share of California Electoral Votes*, www.cnn.com, August 9, 2007; Carla Marinucci, *GOP-backed bid to reform state's electoral process folding*, SAN FRANCISCO CHRONICLE, Sept. 28, 2007.

On August 1, 2007, Hiltachk filed a statement of organization with the California Fair Political Practices Commission registering a state political committee, "Californians for Equal Representation" ("CER"), as a committee primarily formed to support the Presidential Election Reform Act. Available information indicates that in addition to Thomas Hiltachk, other CER organizers included Charles Bell, a partner in Hiltachk's law firm, Kevin Eckery, a Republican consultant, and Marty Wilson, a campaign strategist for Sen. John McCain's presidential committee. Between August 1 and September 10, 2007, CER reported receiving contributions totaling \$1,200 from three separate contributors. Then, on September 11, 2007, CER received a \$175,000 contribution that reportedly came from "TIA Take Initiative America, LLC" ("TIA").

According to its website, TIA is a not-for-profit organization engaged in promoting lower taxation and regulation on American jobs and taxpayers, defending employee paychecks from politics, reforming legal and educational systems, and ensuring greater voter participation. See

¹ To qualify the measure for the June 2008 ballot, supporters of the initiative needed to collect 434,000 signatures of registered California voters by November 13, 2007. Dan Morain, *GOP eyes California's electoral pie*, LOS ANGELES TIMES, August 6, 2007, at B-2.

1 <http://www.takeinitiativeamerica.org/inner.asp?z=1>. The group, which incorporated in the State
2 of Missouri on September 10, 2007, has applied for recognition as a tax exempt organization
3 under section 501(c)(4) of the Internal Revenue Code. According to the group's website, TIA
4 supports three projects, one of which is Californians for Equal Representation.² The TIA website
5 does not contain any information about the group's leaders, supporters, or funders and does not
6 mention any Federal candidates. However, incorporation documents filed with the State of
7 Missouri identify Charles Hurth of Union, Missouri as the corporation's organizer and registered
8 agent. TIA's tax exemption application form, also filed by Charles Hurth, lists Hurth as the sole
9 director and officer, and with respect to the organization's funding, states that:

10 Take Initiative America is funded exclusively through gifts and contributions
11 from its supporters. These supporters include both individuals and corporate
12 entities that support Take Initiative America goals. Although Take Initiative
13 America is a membership organization, its members are not currently required to
14 pay a set amount of dues.

15
16 The group's website does not contain any further information. One day after incorporating, TIA
17 made the \$175,000 contribution to CER.

18 Shortly after CER received the contribution from TIA, the media began questioning the
19 source of TIA's funds and whether TIA and CER were connected to the Giuliani campaign. The
20 Giuliani campaign denied any involvement with the ballot initiative, stating "[w]e are absolutely
21 not involved in that effort" and there is "no coordination between the Giuliani campaign and any
22 statewide effort." Carla Marinucci, *Mystery man's key role in move to change Electoral College*
23 *rules*, SAN FRANCISCO CHRONICLE, Sept. 27, 2007, at A-1. A Giuliani spokesman further stated
24 that "[t]his is completely independent from our campaign, and frankly, it's not an initiative that

² The other two projects include an effort called "First Class Education" and an initiative entitled "Protecting Employees' Paychecks from Politics."

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1 serves our campaign's best interests." Carla Marinucci, *Giuliani backer was funder of state*
2 *electoral initiative*, SAN FRANCISCO CHRONICLE, September 29, 2007.

3 When TIA refused to divulge the source of its funding, CER's main organizers –
4 Hiltachk, Eckery and Wilson – resigned and dissolved CER. Marinucci, *GOP-backed bid to*
5 *reform state's electoral process folding*. Upon announcing his resignation from the group on
6 September 28, 2007, Hiltachk called upon TIA to divulge the source of its funding, and
7 expressed dismay at TIA's failure to inform CER that it had been formed one day prior to making
8 the contribution. Eckery told the media: "There's no reason to be cute on campaign
9 contributions. We had nothing to hide and the public has every right to know." Dan Morain,
10 *GOP electoral initiative dealt major blows*, LOS ANGELES TIMES, September 28, 2007. CER,
11 which officially terminated on October 12, 2007, reported total contributions of \$198,172.80,
12 including the \$175,000 contribution from TIA.³ CER apparently used the funds to pay costs
13 associated with gathering signatures and did not refund most of the contributions after the group
14 folded.⁴ See Morain, *GOP electoral initiative dealt major blows*.

15 The day after CER's officers and key members resigned, hedge fund executive Paul
16 Singer came forward as the source of TIA's \$175,000 contribution to CER. Singer, who was
17 characterized by the media as a "Giuliani policy advisor" and "Giuliani's top fundraiser" issued a
18 statement contending that he contributed to TIA because he believes in proportional voting in the
19 Electoral College and denied that his contribution was connected to the Giuliani campaign.
20 Carla Marinucci, *Giuliani backer was funder of state electoral initiative*.

³ The group also reported receiving a \$28,000 in-kind contribution from a Sacramento public relations firm.

⁴ CER's state disclosure reports indicate that it did actually refund \$6,482.20 to TIA on October 12, 2007, the day CER terminated.

At the end of October 2007, the media reported that another group of individuals, including former Giuliani campaign fundraiser Anne Dunsmore, attempted to revive the ballot initiative effort by forming a group called California Counts. Steven Harmon, *Dems see plot in electoral vote plan*, MEDIA NEWSGROUP, October 29, 2007. Singer denied any involvement with the revived initiative effort. *Id.* Ultimately, neither committee gathered sufficient signatures to qualify the initiative for the June 2008 ballot.

The complaint alleges that Paul Singer is an agent of Rudy Giuliani based upon Singer's alleged roles as a policy advisor to Giuliani and Regional Finance Chair to the Giuliani campaign. The complaint avers that as Giuliani's agent, Singer established, financed, maintained or controlled TIA for the purpose of funding the "Presidential Election Reform Act" ballot measure. As such, the complaint alleges that Singer's contribution to TIA was subject to, and far exceeded, the contribution limits of the Act or that, in the alternative, if the funds came from Singer's company, it may have violated the source prohibitions of the Act. Complaint at 5.

The complaint further contends that the Giuliani campaign may have coordinated with CER. This allegation is based on press accounts that supposedly quote a fundraiser for CER as stating that he heard 'the Giuliani people were interested in funding the campaign.' *Id.* Thus, according to the complaint, expenditures by CER may have resulted in excessive in-kind contributions to the Giuliani campaign. The Complainant also submitted a supplement to the complaint that provides additional information regarding the alleged "ties between the Giuliani campaign and the effort to qualify the California electoral vote measure" but does not make any additional allegations.

The response of the Giuliani Committee denies that it has ever been involved in any way with TIA, either directly or through its agents. According to a sworn affidavit attached to the

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committee's response, Singer mentioned the ballot initiative to a Senior Political Advisor to the Giuliani campaign, Anthony Carbonetti, who advised Singer that "he could do as he wished with his time and money ... and that he could not under any circumstances seek – nor would he receive – the approval or disapproval of the Campaign for this or any other independent endeavor." Thus, contends the Giuliani Committee, Paul Singer was expressly forbidden from acting on the campaign's behalf when he made the contribution to TIA. Furthermore, the Giuliani Committee asserts that none of the other individuals involved with TIA, including founder Charles Hurth and spokesman Jonathan Wilcox, have any connections to the Giuliani campaign other than via several degrees of separation through mutual Republican contacts.

The Giuliani Committee also denies that it coordinated with CER. According to the committee, the quote from CER spokesman Marty Wilson upon which the complaint bases its coordination allegation (that Wilson "heard the Giuliani people were interested [in the ballot measure] and we all said our prayers that it would come in") was an unsubstantiated and untruthful rumor.

III. LEGAL ANALYSIS

Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002) ("BCRA"), Federal candidates and officeholders, agents of Federal candidates and officeholders, or entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, Federal candidates or officeholders (collectively, "covered persons"), may not solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61. Nor may these covered persons solicit, receive, direct, transfer or spend funds in connection with an election

other than an election for Federal office, unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. § 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62.

The Act and its implementing regulations are silent as to whether ballot initiatives are “in connection with an election” so as to be subject to the limitations under 2 U.S.C. § 441i(e)(1)(A) and (B). In recent MURs and Advisory Opinions, the Commission has split on the question of whether ballot initiatives can, under certain circumstances, be considered “in connection with an election.” *See, e.g.*, Advisory Opinions 2007-28 (McCarthy/Nunez) and 2005-10 (Doolittle), and MUR 5367 (Issa). In any event, it does not appear that the Respondents in this matter violated 2 U.S.C. § 441i(e)(1)(A) and (B) because the Giuliani Committee did not “solicit, receive, direct, transfer, spend or disburse funds” for the “Presidential Election Reform Act” ballot initiative. As discussed below, the available evidence indicates that neither Rudy Giuliani nor his authorized committee raised or spent funds for the ballot initiative; Paul Singer was not acting as Giuliani’s agent when he contributed to TIA; and Giuliani did not establish, finance, maintain or control TIA such that its activities would be imputed to Giuliani.

A. Giuliani and the Giuliani Committee did not raise or spend funds for the ballot initiative

There is no information to suggest that Giuliani or his authorized committee solicited, received, directed, transferred, spent, or disbursed funds – federal or nonfederal – to support the “Presidential Election Reform Act.” The complaint does not specifically allege that the Giuliani Committee itself raised or spent funds to support the ballot initiative, and all available information leads to the conclusion that it did not. Furthermore, Giuliani has stated that he did

1 not publicly support the ballot initiative and, prior to the September 29, 2007 revelation that Paul
2 Singer was the source of TIA's funds, media coverage of the ballot initiative did not mention any
3 ties to the Giuliani campaign. *See Kevin Yamamura, Dems Attack Plan to Divide Electoral*
4 *Votes, THE MODESTO BEE, Oct. 8, 2007, at A-1.* As such, the facts do not support a conclusion
5 that Giuliani or his authorized committee directly raised or spent funds in support of the
6 "Presidential Election Reform Act."

7 **B. Paul Singer was not acting as Giuliani's agent when he contributed to TIA**

8 The available information indicates that Paul Singer was acting solely on his own behalf
9 – and not as an agent for Giuliani or the Giuliani Committee – when he made a \$250,000
10 contribution to TIA in September 2007. In implementing BCRA, the Commission defined
11 "agent," as "any person who has actual authority, either express or implied," to act on behalf of a
12 Federal candidate or officeholder. 11 C.F.R. § 300.2(b). The Commission made clear that under
13 BCRA, an agent "does not apply to individuals who do not have any actual authority to act on
14 their [principal's] behalf, but only 'apparent authority'" to do so. Explanation and Justification,
15 67 Fed. Reg. 49063, 49082 (July 29, 2002); *see also* Explanation and Justification, 71 Fed. Reg.
16 4975, 4977-4980 (Jan. 31, 2006). The Commission also made clear that a principal may only be
17 held liable under BCRA for the actions of an agent when the agent is acting on behalf of the
18 principal. *See* 67 Fed. Reg. at 49083. "[I]t is not enough that there is some relationship or
19 contact between the principal and agent; rather, the agent must be acting on behalf of the
20 principal to create potential liability for the principal. This additional requirement ensures that
21 liability will not attach due solely to the agency relationship, but only to the agent's performance
22 of prohibited acts for the principal." *Id.*

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1 In this matter, the Giuliani Committee has presented information – in the form of a sworn
2 affidavit – that Singer was expressly informed that he was *not* authorized to act on behalf of the
3 Giuliani campaign when he contributed his own funds to TIA. Singer also explicitly stated that
4 he was acting on his own behalf and not for the Giuliani Committee when he made the \$250,000
5 contribution to TIA, and he further stated that he has never represented to anyone that he made
6 the donation on behalf of the Giuliani campaign. Although the complaint attempts to establish
7 that Singer had an agency relationship with the Giuliani Committee by virtue of his role as a
8 Regional Finance Chair and policy advisor for the committee, these contacts are not sufficient to
9 establish that Singer was acting on behalf of the Giuliani Committee when he made the
10 contribution. At the time Singer made the contribution to TIA in September 2007, Singer had
11 already been removed from his fundraising role three months earlier, and his role as policy
12 advisor did not include any activities related to fundraising. As such, it does not appear that Paul
13 Singer was an agent of the Giuliani Committee when he made the contribution to TIA.

14 C. **Giuliani or the Giuliani Committee did not establish, finance, maintain or**
15 **control TIA**
16

17 Finally, there is no evidence that the Giuliani Committee established, financed,
18 maintained or controlled TIA such that its activities would be imputed to Giuliani. To determine
19 whether a Federal candidate or officeholder directly or indirectly established, financed
20 maintained or controlled another entity, the Commission applies the ten factors set forth at
21 11 C.F.R. § 300.2(c)(2)(i) through (x), as well as any other relevant factors, in the context of the
22 overall relationship between the Federal candidate or officeholder and the entity.

23 The only information the complainant points to in support of its allegation that the
24 Giuliani Committee “established” TIA is that TIA was incorporated by an individual who

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1 donated \$2,000 to the Giuliani campaign and who is a former political associate of another donor
2 and fundraiser for the Giuliani campaign. In sworn statements, both of those individuals deny
3 that their support of the Giuliani campaign had anything to do with TIA or the Presidential
4 Election Reform Act. The complaint further attempted to connect TIA to the Giuliani
5 Committee by pointing out that TIA's spokesman was the *former* spokesman for a Giuliani
6 campaign co-chair and policy advisor. However, neither of these tenuous connections is
7 sufficient to suggest that the Giuliani Committee established, financed, maintained or controlled
8 TIA.

9 Furthermore, an analysis of the ten factors indicates that the Giuliani Committee did not
10 establish, finance, maintain or control TIA. The available information, including the sworn
11 affidavit of TIA's sole and primary officer, establishes that neither Rudy Giuliani nor the Giuliani
12 Committee had a role in the formation of TIA; owns any interest in TIA; or has ever directed or
13 participated in, or had the authority or ability to direct or participate in, activities or governance
14 of TIA. Furthermore, it appears that TIA and the Giuliani Committee share no overlapping
15 officers or employees, and do not have similar patterns of receipts and disbursements. As
16 discussed in greater detail above, it also does not appear that the Giuliani Committee caused or
17 arranged for funds in a significant amount to be provided to TIA. *See* 11 C.F.R.
18 § 300.2(c)(2)(viii).

19 Accordingly, it does not appear that the Respondents violated 2 U.S.C. § 441i(e)(1)(A)
20 and (B) because Rudy Giuliani, the Giuliani Committee, any agents acting on its behalf, and any
21 entities that they established, financed maintained or controlled did not "solicit, receive, direct,
22 transfer, spend or disburse funds" for the Presidential Election Reform Act ballot initiative. As a
23 result, it also appears that the Giuliani Committee did not solicit or direct contributions to Take

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Initiative America, LLC, in excess of the federal limits in violation of 2 U.S.C. § 441a; or solicit or direct contributions to Take Initiative America, LLC, from impermissible sources such as corporations or foreign entities in violation of 2 U.S.C. §§ 441b and 441e.

D. Coordination

There is also no evidence of coordination between the Giuliani Committee and CER. Under the Commission's regulations, any expenditures that are made in cooperation, consultation or in concert with, or at the request or suggestion of a candidate or a candidate's authorized committee, but that are not coordinated communications, party coordinated communications, or coordinated party expenditures, are in-kind contributions to the candidate and must be reported as an expenditure by that candidate. 11 C.F.R. § 109.20(b).

The complaint bases its coordination allegation entirely on press accounts that supposedly quote a fundraiser for CER as stating that he heard 'the Giuliani people were interested in funding the campaign.' In its response, the Giuliani Committee expressly denies that it coordinated with CER and includes a sworn affidavit from a Giuliani Committee staffer who substantiates the Committee's position. Similarly, CER also denies in its response that it coordinated in any way with the Giuliani Committee and asserts that it did not even know that someone who had a connection to Giuliani was the source of TIA's funds. The coordination allegation contained in the complaint appears to be sufficiently refuted by the facts presented in the Giuliani Committee and CER responses. As the Commission has previously stated, unwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true, and "[s]uch speculative charges, especially when accompanied by direct refutation, do not form an adequate basis to find reason to believe that a violation of FECA has occurred."

1 Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory
2 Committee, issued Dec. 21, 2000) (citations omitted).

3 Therefore, there is no reason to believe that Rudolph W. Giuliani and the Rudy Giuliani
4 Presidential Committee, Inc. and John H. Gross, in his official capacity as treasurer, violated the
5 Act in connection with the allegations contained in the complaint in this matter.

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